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IN THE

Supreme Court of the United States

APRIL TERM, 1981

NUMBER _____

L. T. BRADT,
Petitioner

v.

HONORABLE SHEARN SMITH, ET AL,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH JUDICIAL CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in dismissing Bradt's case, on Motion to Dismiss, without a Trial or Hearing wherein Petitioner had the opportunity to prove the facts alleged in support of his Complaint?

2. Whether the Court of Appeals erred in affirming the holding of the District Court that all of the Defendants in the case below were immune from Bradt's Claim for Damages and Injunctive Relief under Title 42 U.S.C. Section 1983?

3. Whether the Court of Appeals erred in holding that the alleged deprivation of Petitioner's work-product immunity and his Attorney-Client Privilege did not involve a deprivation of Bradt's privileges, or immunities secured by the Constitution and laws of the United States?

4. Whether the Court of Appeals erred in failing to hold that actions of the Respondent State District Judge in acting after Notice of the Filing of the Petition for Removal, together with Bond were served upon him, and prior to Remand, violated rights, privileges, or immunities secured to Petitioner by the laws of the United States?

5. Whether the Court of Appeals erred in holding that no deprivation of Petitioner's 5th Amendment Privilege against Compulsory Self-Incrimination occurred below?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH JUDICIAL CIRCUIT

The Petitioner, L. T. Bradt, a member of the Bar of this Court, respectfully requests that a Writ of Certiorari issue to review the Judgment of the Court of Appeals of the Fifth Circuit entered January 19, 1981, under said Court's summary calendar without oral argument, and the Order of said Court, dated February 18, 1981, denying rehearing, which affirmed the decision of the United States District Court for the Southern District of Texas, John V. Singleton.

OPINION BELOW

The Fifth Circuit Court of Appeals, by its Judgment appearing in Appendix E, affirmed the decision of the United States District Court for the Southern District of Texas, John V. Singleton, dismissing Petitioner's Complaint under Title 42 U.S.C.A. 1983, 1985 and 1986. A copy of the District Court decision is attached hereto at Appendix A. The Circuit Court denied Petitioner's Motion for Rehearing on February 18, 1981, by its judgment appearing in Appendix F.

JURISDICTION

The Judgment of the Fifth Circuit affirming the decision of the United States District Court for the Southern District of Texas, John V. Singleton, was dated January, 1981. This Court's jurisdiction is invoked under 28 U.S.C.A. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of Amendments V, IX, and XIV of the Constitution of the United States are set forth in Appendices B through D respectively.

STATEMENT OF FACTS

This case came before the United States Court of Appeals for the Fifth Circuit by way of the direct appeal from an Order entered by the United States District Court for the Southern District of Texas, John V. Singleton, dismissing Petitioner's Civil Rights Complaint under Title 42 U.S.C. § 1983, and other federal statutes, under which Petitioner sought damages and injunctive relief. The District Court disposed of the case under Federal Rules of

Civil Procedure, Rules 12 and 15(b)(3) without hearing any evidence or taking any testimony with respect to the allegations of said Complaint. Motions to Dismiss were made under said Rule by all of the Defendants in the case and all of said Motions were granted by the District Court.

The controversy out of which the cause of action occurred arose when L. T. Bradt, a Texas Attorney, was ordered by the 61st Judicial District Court of Harris County, Texas, Honorable Shearn Smith presiding, to produce certain physical files of Clients of his then lawfirm, Minns, Izen, Bradt and Associates, P.C., a Texas Professional Corporation organized under the laws of the State of Texas to practice law. Prior to the entry of that Order by the State District Court Petitioner had permitted the discovery of a list of the names of the above referenced Clients and had divulged the total fees earned from each. The State Court was not satisfied with the production which Petitioner made and continued to demand, under threat of Criminal Contempt, production of the physical files of said Clients. At all times in the proceeding below, in the State District Court, Petitioner feared that the contents of the physical files of his Clients, sacrosanct under the Attorney-Client Privilege, might be divulged to the public. Petitioner asserted rights and privileges against disclosure of the physical files of certain of his Clients for whom he had appeared in legal actions, pending and non-pending, as Attorney of Record. Petitioner in the discovery proceeding before the 61st Judicial District Court of Harris County, Texas, asserted his privilege against self-incrimination, work-product immunity, and the Attorney-Client privilege against the sought for disclosure. Petitioner's claim against self-incrimination

arose out of threats during the taking of his oral depositions by Respondent, Tom Alexander, that he, Tom Alexander, was going to "turn over a copy of Petitioner's deposition to the Grand Jury". Other Respondents sought an Order from Honorable Shearn Smith requiring Petitioner to disclose the full contents of several pending Federal cases before the Southern District of Texas in which Petitioner was in the process of appearing as Attorney of Record. The disclosure sought by said Respondents, and compelled by the Orders of Respondent Smith, would have resulted in the full scale public disclosure of the contents of the Clients' files which were involved in pending litigation in the Federal Courts, as well as State Courts. Petitioner resisted these efforts by Respondents. Respondent Smith, in the face of these actions by Petitioner, instituted a quasi-criminal contempt proceeding against Petitioner, L. T. Bradt, sua sponte, and completely independent of the underlying action in which the illegal discovery was sought by Respondents. Respondents John B. Bible and Associates, a Professional Corporation, and John B. Bible were present at the Contempt Hearings and were represented by Tom Alexander, an Attorney for the firm of Butler, Binion, Rice, Cook and Knapp. The State District Court, acting under local prejudice brought to bear by the firm of Butler, Binion, Rice, Cook and Knapp coerced the Petitioner into appearing before the Court to give testimony and produce records. Bradt steadfastly asserted the Attorney-Client privilege, the privilege against self incrimination, and his federal work-product immunity in order to avoid producing his Clients' files and making them a public record. After unsuccessfully attempting to remove the (above-referenced) Contempt proceeding, L. T. Bradt filed suit in the United States

District Court for the Southern District of Texas under 42 U.S.C. §§ 1983, 1985(2) and (3), and 1986 to enjoin the unlawful conduct of the State District Judge and to recover his damages from the other Respondents, if any, acting in concert with him. L. T. Bradt, Petitioner, had previously removed the Contempt Proceeding based upon the Federal Questions raised in the Contempt action, in which he was Defendant, concerning the viability of the work-product immunity. The issue was not resolved prior to the remand of the case by the Southern District of Texas to the State Court.

The contempt hearing alluded to above had been terminated when L. T. Bradt served Notice of Removal on the Honorable Shearn Smith and Respondents, John B. Bible and Associates, a Professional Corporation, John B. Bible and Tom Alexander pursuant to Title 28 U.S.C. Section 1446(e). Respondent Smith acted in violation of the stay on removal provided by said Statute. Specifically said Respondent divulged the entire contents of 10 files of L. T. Bradt's Clients which had been produced for in camera inspection and pronounced L. T. Bradt to be in contempt after the Notice of Removal had been served upon him.

Petitioner's First Complaint did not seek damages from Respondent Smith, but only sought injunctive relief. Petitioner's Complaint was later amended to seek damages for the violation of the stay provided by Title 28 U.S.C. Section 1446(e) which the State Judge ignored and violated. Bradt contended below, in the Federal District Court, without success, that the violation of the stay by the State District Judge removed any cloak of judicial immunity said judge might have because said judge, in

violating the stay provided by Federal Statute, acted in "absence of all jurisdiction".

The District Court for the Southern District of Texas dismissed Petitioner's Civil Rights Complaint summarily without taking any evidence or hearing any testimony asserting that Bradt's Claim was without its own jurisdiction. The District Court was further of the opinion that the granting of an injunction was discretionary on the part of the Federal Court even if jurisdiction existed. (See Page 2747 of the Opinion of the United States Court of Appeals for the Fifth Circuit styled *Bradt v. Smith* attached hereto and marked as Appendix "E").

The opinion of the United States Court of Appeals for the Fifth Circuit held that the work-product immunity of Petitioner, L. T. Bradt, even with respect to production of pending federal files of his Clients, was not a "right, privilege, or immunity secured by the Constitution and Laws of the United States" so as to be within the protective ambit of Title 42 U.S.C.A. Section 1983. The Court of Appeals made a similar holding with respect to the Attorney-Client privilege asserted by Petitioner against the production of the files in the State Court. The Court of Appeals also held that no reading of the facts was delineated in Bradt's Amended Complaint, his Brief to the District Court, or his Brief to the Court of Appeals, which could lead to the conclusion that a deprivation of the Fifth Amendment Privilege against self-incrimination had occurred. (See line 5, page 2749 of the Opinion of the Court of Appeals, Appendix "E"). Thus, the Court of Appeals affirmed the dismissal of Petitioner's Civil Rights Complaint, with respect to his claims for deprivation of his privilege against self-incrimi-

nation, *solely* on the basis of the well-pleaded facts contained in Petitioner's Amended Complaint.

Petitioner was never given the opportunity to prove any of the facts alleged in the Amended Complaint referred to by the Court of Appeals in rendering their decision. In upholding the District Court's dismissal, the Fifth Circuit denied Petitioner any relief, either injunctive or pecuniary, for the deprivation of his work-product immunity, Attorney-Client privilege, and privilege against self-incrimination. Some of the questions poised by this Writ of Certiorari have not been passed upon, before, by this Supreme Court.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS ERRED IN DISMISSING BRADT'S CASE, ON MOTION TO DISMISS, WITHOUT A TRIAL OR HEARING WHEREIN PETITIONER HAD THE OPPORTUNITY TO PROVE THE FACTS ALLEGED IN SUPPORT OF HIS COMPLAINT.

It is a well settled Federal Rule of Law that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that a Plaintiff can prove in support of his claim no set of facts which would entitle him to relief. See *International Erectors v. Wilhoit Steel Erectors and Rail Service,* 400 F.2d 465 (C.A. 5, 1968). In that case, the Fifth Circuit quoted *Conley v. Gibson,* 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) as the "guide for the rigorous rule that a complaint should not be dismissed for failure to state a claim unless it appears

beyond doubt that a Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Further, the Fifth Circuit observed that "dismissal of a claim on the basis of bare bone pleadings is a precarious disposition with a high mortality rate. See *Barber v. Motor Vessel "Blue Cat"*, 372 F.2d 626 (C.A. 5, 1967). "A motion to dismiss on the basis of pleadings alone should rarely be granted." See *Madison v. Purdy*, 410 F.2d 99 (C.A. 5, 1969). The Court, in that opinion, also went on to state that "on motion to dismiss on basis of pleadings, the Court must accept as true, all facts which are well pleaded in the complaint and must view such facts in light most favorable to Plaintiff." "If complaint alleges facts, which, under any theory of the law, would entitle complainant to recover, action may not be dismissed for failure to state a claim." See *Due v. Tallahassee Theaters, Inc.*, 333 F.2d 630 (C.A. 5, 1964).

The application of the above stated principles to the instant case before this Court is clear. Bradt's case below should not have been dismissed without allowing him an opportunity to prove the factual allegations stated in support of his complaint. The dismissal below was premature and constituted clear error.

This Fifth Circuit Court of Appeals stated in *Campbell v. Beto*, 460 F.2d 765 (C.A. 5, 1972) that "Petitions under 1983 should not be dismissed on the pleadings unless it appears to a certainty that Plaintiff would not be entitled to recover under any state of facts which could be proved in support of his claim." The Court stated "for purposes of considering motion to dismiss, the well pleaded allegations of the complaint must be accepted as true." Bradt was never given the opportunity to prove

any of his allegations in the District Court below. This violated the principle laid down in *Reeves v. City of Jackson, Mississippi,* 532 F.2d 491 (C.A. 5, 1976), a suit under the civil rights act, wherein the Court stated "District Court should give the Plaintiff the full fanfare of a Federal Court claim at least until it can see what the real facts are; if, after full development of the facts, Plaintiff is obviously not entitled to relief, the claim may be washed out on Summary Judgment, by Motion for Directed Verdict, or by Judgment N.O.V." Clearly, summary disposition of the case below, by motion to dismiss, was erroneous.

II.

THE COURT OF APPEALS ERRED IN AFFIRMING THE HOLDING OF THE DISTRICT COURT THAT ALL OF THE DEFENDANTS IN THE CASE BELOW WERE IMMUNE FROM BRADT'S CLAIM FOR DAMAGES AND INJUNCTIVE RELIEF UNDER TITLE 42 U.S.C. SECTION 1983.

The leading case in this area involving the protection judicial immunity precludes a claim for damages against a judge for violation of civil rights under Section 1983. See *Stump v. Sparkman,* 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331. The Supreme Court of the United States, in that case, reaffirmed the general principle that State Court Judges would not be held liable in damages for violations of the civil rights acts, specifically Title 42 U.S.C. Section 1983. A careful reading of the opinion in that case seems to indicate that the State Judge escaped liability because he had the jurisdiction provided to him by state law, to perform the judicial action on which the

Plaintiff in that case based his damages. As the Court stated "the judge had jurisdiction to act on the petition and did not act in the clear absence of all jurisdiction, there being no state statute or case law prohibiting the State Court from considering sterilization petitions presented by the parents of minors". The key determination therefore, established by *Stump*, is whether or not the Judge sued acted in clear absence of jurisdiction. In the case below, Plaintiff's complaint specifically alleges that the Respondent, Honorable Shearn Smith, violated the Automatic Stay of the State Court Proceeding provided by Title 28, U.S.C. § 1446(e). Violation of this Stay is a non-judicial act which deprives said Respondent of the absolute immunity normally enjoyed pursuant to the general rule. If Bradt can prove the allegations contained in his Amended Complaint filed below, he is entitled to damages from the State Judge, provided the State Judge's acts in violation of the stay constituted acts performed in clear absence of all jurisdiction and, under this rationale, if Honorable Shearn Smith may be held liable for these damages, it follows that the other Respondents John B. Bible, John B. Bible & Associates, Tom Alexander and Butler, Binion, Rice, Cook & Knapp, who were alleged to have acted in conspiracy and concert with Smith in said violation, would also be liable, jointly and severally, for the damages alleged. Again, the facts of the case were not well developed in the District Court below. Bradt should have been given an opportunity to develop the facts before the Court made its determination. Error was clearly committed by the Court when it failed to give Petitioner his Day in Court. Respondents cannot prevail on the issue of damages in this appeal unless this Court is willing to hold that the actions of the Honorable Shearn

Smith in proceeding in the face of the Stay, after notice was served on him pursuant to § 1446(e) and in making the files public, was not an action performed in the absence of all jurisdiction. It is averred by Petitioner that any such legal determination on this issue by this Court would result in a frustration of the congressional intent underlying that U.S. Statute to stay all State actions until a determination of the merits of removal jurisdiction is made by a Federal District Court.

It is conceded by Petitioner herein that State Court Judges are immune from damage suits brought under Title 42 U.S.C. Section 1983 *unless* the act causing the damages was performed in the absence of all jurisdiction. However, it is the clear Rule of Law in the Fifth Circuit and others, that State Court Judges are not immune from being enjoined under Section 1983. Section 1983 has been held by the Supreme Court to be an express exception to the anti-injunction statute. See *Mitchum v. Foster*, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (S.Ct. 1972). In *United States v. McLeod*, 385 F.2d 734 (C.A. 5, 1967), the Fifth Circuit Court of Appeals considered the effect of the United States Supreme Court Decision of *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213 (U.S. S.Ct., 1967) on the issue of whether or not a State Court Judge was immune from being enjoined by a Federal Court acting under 42 U.S.C. Section 1983. According to Justice Wisdom, "*Pierson v. Ray* does not, of course, mean that Judges may not be enjoined from pursuing a course of unlawful conduct." *Pierson* stood for the proposition that State Court Judges were immune from *damage suits* brought under 42 U.S.C. Section 1983. The holding of the United States Supreme Court was limited to that expressed principle. In *Littleton v. Berbling*, 486 F.2d

389 (C.A. 7, 1972), the Seventh Circuit adopted a view similar to that of the Fifth Circuit Court of Appeals. According to the Seventh Circuit, "though judges are immune from damage suits under civil rights statutes for acts they do and discharge in their official duties, . . . Judicial Officers may be enjoined." The Seventh Circuit also stated that "dismissal should be sparingly used whenever it appears that a basis for Federal Jurisdiction in fact exists or may exist and can be stated by Plaintiff." That Appellate Court went on to examine the rationale for the *Pierson* opinion and stated "the grant of certiorari in *Pierson* was to consider the local judges' liability for damages under Section 1983 for an unconstitutional conviction . . ." "The Court did not consider the issue of immunity from injunctive or other equitable relief. Nor do either of the cases cited by the District Court in its Memorandum and Order in that case before us hold that the sort of relief requested by Plaintiffs herein is barred." "The principle that no State Official regardless of his position is immune from having his conduct challenged in the form of a preventive action is well established. *Cooper v. Aaron,* 358 U.S. 1; *Lucas v. 44th General Assembly of State of Colorado,* 377 U.S. 713; *Bush v. Orleans Parish School Board,* (E.D. La. 1960)." "Such an action involves no interference with Judicial Discretion since an injunction if warranted by the evidence and issued will only prevent the doing of what there is no right to do. *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, etc." In a more recent case, *Bramlett v. Peterson,* 307 F.Supp. (M.D. Florida, 1969), a Federal District Court enjoined a State Court Judge. According to that decision, "the rule of judicial immunity under civil rights law generally is restricted to damage suits and does not apply

to suits for injunctive and protective relief, 42 U.S.C. Section 1983."

Obviously, the above line of cases constitute a creeping in-road into the once sacred and impenetrable fortress called Judicial Immunity. The crowning blow that brings down its walls may well have already been struck. In *Supreme Court of Virginia v. Consumers Union of the United States,* 100 S.Ct. 1967 (1980) the Supreme Court of the United States held that the justices of the Virginia Supreme Court were subject to being enjoined in a Section 1983 action from acting in their legislative and executive capacities. In that case, the State of Virginia had empowered the Virginia Supreme Court with the right to regulate the practice of law in that state as well as to regulate the conduct of the members of the State Bar. The Virginia Supreme Court had adamantly refused to allow advertising in the state by members of the bar. This being contrary to Precedent established by the Supreme Court of the United States in *Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed. 2d 810, a panel of three District Judges enjoined the Justices of the Virginia Supreme Court from enforcing any of the anti-advertising rules promulgated and awarded attorney's fees against the Justices. The Supreme Court of the United States, in its *Supreme Court of Virginia* opinion, expressly reserved the issue of whether or not judicial immunity would bar prospective (injunctive) relief. Admittedly, the Supreme Court made a distinction between the Enforcement capacity and the Judicial capacity, finding that the Justice of the Virginia Court acted in the former rather than the latter. The Court also stated "The Court of Appeals appeared to be divided on the question whether Judicial Immunity bars declaratory or

injunctive relief; we have not addressed the question." Since the issue of judicial immunity was expressly reserved in the *Supreme Court of Virginia* decision by the Supreme Court of the United States, it is respectfully urged that the District Judge's characterization of Bradt's claims for injunctive relief as frivolous, be completely disregarded and not taken seriously. Petitioner is convinced that when the Supreme Court of the United States decides this issue, it will hold that Judicial Immunity is no bar to injunctive relief against a judge purporting to act in his Judicial Capacity. The authority in the Fifth Circuit holds in conformity with this predicted result.

III.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE ALLEGED DEPRIVATION OF PETITIONER'S WORK PRODUCT IMMUNITY AND HIS ATTORNEY-CLIENT PRIVILEGE DID NOT INVOLVE DEPRIVATION OF BRADT'S PRIVILEGES OR IMMUNITIES SECURED BY THE CONSTITUTION AND THE LAWS OF THE UNITED STATES.

Monroe v. Pape, 365 U.S. 167, 87 S.Ct. 473 (S.Ct.. 1961) stood for the proposition that "under Statute making every person who, under color of any State Statute, Ordinance, Regulation, etc., whoever deprives any citizen of the United States of his constitutional rights is liable to the party injured, Federal remedy is supplementary to the State, and stay remedy, if any, need not be first sought and refused before Federal one invoked. 42 U.S.C.A. Section 1983." In *Lynch v. Household Finance Corporation,* 406 U.S. 911, 96 S.Ct. 1611 (1973) the Court stated "for purposes of Statute giving

Federal Courts jurisdiction of civil action to redress deprivation, under color of law, of equal rights, there is no distinction between personal liberties and proprietary rights. 28 U.S.C.A. Section 1343(3)." The Courts of the State of Texas in the instant cause have failed to recognize the work-product immunity guaranteed members of the Federal Bar with respect to pending litigation. Many of the files ordered to be produced by the State District Judge were files concerning pending Federal litigation. Thus, the protection of the work-product immunity established in *Hickman v. Taylor,* 329 U.S. 495, 67 S.Ct. 385 (S.Ct., 1947) should have been applicable to Bradt, the Petitioner herein, even if the State of Texas do not recognize the work-product immunity of attorneys in State litigation. Petitioner avers that, for the purposes of the work-product immunity, it is the forum Court in which the litigation is pending which determines the nature and extent of the immunity. The right to Federal work-product immunity should not be derogated simply because pending Federal files are ordered to be disclosed by State Judge in Collateral State Litigation. The same principle should hold true for non-collateral state litigation. In fact, the Federal case files ordered to be produced by Respondent Shearn Smith bore an extremely obtuse relationship to the State litigation. Certainly, the right possessed by Bradt under the work-product immunity granted him under the Federal Rules of Civil Procedure should not have been abbrogated by State Discovery Orders issuing from a State Court. In the collision between the two, the Federal branch should be paramount. Furthermore, Petitioner avers that a careful study of the history of the work-product immunity will indicate that the Federal Rules of Civil Procedure, and, indeed, the Federal Rules of Criminal Procedure, embodied many

fundamental rights of litigants which existed under the old Federal Common Law Rules and to the New Codes of Procedure. Petitioner avers that the work-product immunity existed prior to the Federal Rules of Civil Procedure as a part of Federal Common Law. The Federal Rules of Civil Procedure merely restated what was already a right existing under Federal Common Law. The Respondents cited no authority below for the proposition that the Federal work-product immunity, at least, as to those Federal cases whereof if discovery was sought in State Court, had no binding effect whatsoever, either through Federal law or the United States Constitution, upon the States. The mere fact that the states are free to apply their own concepts and formulations of the work-product immunity to State litigation does not mean that a State may abbrogate the work-product immunity of a member of the Federal Bar in pending Federal cases. Obviously, in the case below, Respondents interfered, collectively, with pending Federal litigation by ordering discovery in violation of the work-product immunity privilege held by the Petitioner.

In *Keker v. Procunier,* 398 F.Supp. 756 (E.D. California, 1975) the Federal District Court was faced with a Section 1983 action similar to the one that occurred below. In that case the Plaintiff's attorneys had been harassed by State officials in their efforts have representing their criminal clients for them in Departments of Correction of the State of California. According to the District Judge, McBride, "The Fourteenth Amendment guarantees an individual the right to engage in any of the common occupations or professions of life. Such a right is both a "liberty" and "property" right protected from state deprivation or undue interference." (*id.* at p. 760).

The Judge in this opinion stated that Attorneys are charged with the advancement and protection of property, liberty, and occasionally life. The Decision of the District Judge upheld Plaintiff's demand for his work-product immunity because, according to that decision, an Attorney has a right to practice a legal profession according to its high standards. The Court therein upheld an action brought under 42 U.S.C. Section 1983 for denial of equal protection of the laws. The District Judge went on to state that "punitive or exemplary damages are recoverable in a civil rights action." Petitioner, L. T. Bradt, has suffered undue interference of the representation of his Clients in pending Federal and State litigation as a result of the illegal discovery orders sought by and/or entered by the Respondents. Bradt should have been given the chance to prove facts in support of his claims for relief which would have entitled him to protection from this undue interference.

IV.

THE COURT OF APPEALS ERRED IN FAILING TO HOLD THAT ACTIONS TAKEN BY THE RESPONDENT, SMITH, AFTER NOTICE OF FILING OF THE PETITION FOR REMOVAL AND BOND WERE SERVED UPON HIM, AND PRIOR TO REMAND, VIOLATED RIGHTS, PRIVILEGES OR IMMUNITIES SECURED TO PETITIONER BY THE LAWS OF THE UNITED STATES.

Petitioner personally filed his Petition for Removal, together with bond, in the District Court of the United States for the Southern District of Texas, Houston Division, and thereafter proceeded to return to the Court where Respondent Smith was presiding. After filing a

copy of the Petition and Bond with the Clerk of the State Court, upon entering said Court, Petitioner personally presented Respondent Smith with the copy of the Petition for Removal and bond which had been filed less than one-half hour previously in Federal Court. Respondent Smith thereupon proceeded to interrogate Petitioner, who refused to answer each question proffered, deferring to the effect of the Removal. Respondent Smith thereupon proceeded to enter into evidence all of the files which had been theretofore tendered, under protest, for examination in camera, and found Petitioner to be in contempt of Court, threatening all the while to "deal with Petitioner when the case was remanded." Title 28 U.S.C.A. Section 1446(e) clearly requires that the State Court stop all proceedings, once Notice is given, until a determination on the merits of the Petition for Removal is made in Federal Court. *Adair Pipeline Co. Inc. v. Pipeliners Local Union No. 798,* 203 F.Supp. 434 (S.D. Tex. 1962). In the instant case, Respondent Smith had actual Notice of the filing of the Petition for Removal, but cases have held that even constructive Notice under 28 U.S.C. Section 1446(e) would have been sufficient to deprive the State Court of jurisdiction, thus making any further proceedings void. *Medrano v. State of Texas,* 580 F.2d 803 (C.A. 5, 1978). Clearly Congress intended in enacting Section 1446 that the State Courts not proceed unless and until the Federal Court to which the case had been removed had determined the merits of the removal, in order that Petitioner's rights on removal not be prejudiced by actions in the State Court as same had no jurisdiction. Clearly this is the right secured to Petitioner by the laws of the United States which was violated by Respondent Smith and those acting in concert with him, which the Court of Appeals failed to hold as grounds for reversal.

V.

THE COURT OF APPEALS ERRED IN HOLDING THAT NO DEPRIVATION OF PETITIONER'S FIFTH AMENDMENT PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION OCCURRED BELOW.

Respondent, Tom Alexander, Attorney in the State Court action, for Respondent John B. Bible and John B. Bible and Associates, a Professional Corporation, threatened Bradt with disclosure of the contents of his Deposition to a State Grand Jury and to the State Bar Grievance Committee. Respondent Smith, in the face of this threat, then attempted to force Bradt to continue to give testimony. Smith attempted to coerce further testimony by threatening sanctions under criminal contempt. Besides of being violative of the disciplinary rule, common to all of the various States, and part of the Texas Code of Professional Responsibility, such activity obviously subjected Bradt to the threat of possible criminal culpability should he give any further testimony. The privilege against self-incrimination is one so fundamental and so well-worn by this Honorable Court that extensive citation to support this argument is not necessary. The District Judge below, Shearn Smith, failed to meaningfully evaluate the threat of self-incrimination inimical to further examination before ordering Bradt to continue to testify. This Court, with an ancient hand dating back to *U.S. v. Burr,* 25 Fed. Cas. 38 (Cir.Ct.D. Virginia, 1807), has consistently directed Courts to evaluate the Fifth Amendment Plea of a witness to determine whether or not any further answers could possibly tend to incriminate him under the underlying facts of the case. This the State Judge refused to do. The violation of the Fifth Amendment Privilege of Bradt, below, was of sufficient magnitude to support an

action for damages and injunctive relief absent consideration of any other claims.

CONCLUSION

For all of the above reasons, authority and argument the judgment of the District Court of the Southern District of Texas, John V. Singleton, dismissing Bradt's Amended Complaint and the Decision of the Fifth Circuit Court of Appeals of the United States affirming same should be reversed and this Honorable Supreme Court should issue its Order remanding the cause to the District Court below for a full and complete presentation of the claims on their merits.

Respectfully submitted,

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APPENDIX A

L. T. BRADT, Plaintiff-Appellant,

v.

Honorable Shearn SMITH et al.,
Defendants-Appellees.

No. 80-1461

Summary Calendar.

UNITED STATES COURT OF APPEALS,
Fifth Circuit.
Unit A

Jan. 19, 1981.

A civil rights suit for damages and injunctive relief was brought by attorney against clients, sued in state court for nonpayment of legal fees, and against clients' attorneys and the state trial judge who ordered plaintiff to produce certain documents for clients' inspection. The United States District Court for the Southern District of Texas, at Houston, John V. Singleton, Jr., Chief Judge, dismissed the suit for failure to state a claim upon which relief could be granted, and plaintiff appealed. The Court of Appeals, Tate, Circuit Judge, held that the well-pleaded allegations of the complaint failed to show the deprivation of a federal right as required by 42 U.S.C.A. § 1983, interference with a federal judicial proceeding as required by 42 U.S.C.A. § 1985(2), or a racial or class-based discriminatory animus as required by 42 U.S.C.A. § 1985 (2, 3).

Affirmed.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, POLITZ and TATE, Circuit Judges.

TATE, Circuit Judge:

This is an appeal from a judgment dismissing the plaintiff's action for damages and injunctive relief under 42 U.S.C. §§ 1983, 1985(2)-(3), and 1986 for failure to state a claim upon which relief could be granted. *See* Fed. R. Civ. P. 12(b)(6). Because the well-pleaded allegations of the complaint fail to show the deprivation of a federal right as required by § 1983, interference with a federal judicial proceeding as required by § 1985(2), or a racial or class-based discriminatory animus as required by §§ 1985(2)-(3), we conclude that the plaintiff has failed to state a claim upon which relief could be granted under §§ 1983, 1985, or 1986. The order of the court below is AFFIRMED.

Facts

L. T. Bradt, a Texas attorney, brought suit in a state district court of Texas to collect legal fees from John B. Bible and John B. Bible & Associates, Inc. During the course of that action the state trial judge, the Honorable Shearn Smith, ordered the production of certain documents, including client files, for inspection by Bible and his attorneys. Bradt produced ten of these files, but refused further compliance. On October 9, 1978, Judge Smith cited Bradt for contempt and ordered the production of the remainder of the files on the following day. Instead of complying, Bradt filed a petition for removal of the contempt action to the United States District Court

From the order of the district court Bradt brings this appeal, urging the several points of error,[2] including that the district court erred in granting the defendants' motion to dismiss without affording Bradt the opportunity to prove the facts alleged in his complaint.

We need not address the particular points of error raised by the appellant in his brief; for the well-pleaded allegations of the complaint, taken as true, fail to show: the deprivation of any right, privilege, or immunity secured by the Constitution or laws of the United States as required by 42 U.S.C. § 1983; a nexus with a federal judicial proceeding as required by 42 U.S.C. § 1985(2); or a racial or class-based invidiously discriminatory animus as required by 42 U.S.C. § 1985(2)-(3).[3] Accordingly, we affirm the judgment of the district court dismissing this suit.

I

42 U.S.C. § 1983 provides in part:

---

2. The appellees characterize Bradt's arguments on appeal as an abandonment of his contentions under §§ 1985 and 1986. *See* Brief for Appellee Smith, at 5 n.1; Brief for Appellees Alexander, *et al.*, at 2 n.1. We do not share that view. Bradt urges that the district court erred in dismissing his action without affording him the opportunity to prove the factual allegations of his complaint. That contention is more than a procedural challenge. *See* Brief for Appellees Alexander, *et al.*, at 5-6. In essence, Bradt is urging that his complaint does, in fact, state a claim upon which relief could be granted, and that the district court's summary disposition of his action was therefore in error. To our eye, this assertion encompasses the whole of the complaint below, including the contentions under §§ 1985 and 1986.

3. In terms, 42 U.S.C. § 1986 requires the existence of a valid claim under § 1985. Thus, the § 1986 contentions are foreclosed by the absence of the prerequisites for a valid claim under § 1985. See Part III of this opinion, below.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any *rights, privileges, or immunities secured by the Constitution and laws,* shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (Italics ours).

[1, 2] In order to state a claim upon which relief can be granted under § 1983, the complaint must show the deprivation of a right that is secured by the Constitution or laws of the United States. *Martinez v. California,* 444 U.S. 277, 283, 100 S.Ct. 553, 558, 62 L.Ed.2d 481 (1980); *Baker v. McCollan,* 443 U.S. 137, 139, 99 S.Ct. 2689, 2692, 61 L.Ed.2d 433 (1979). An examination of the amended complaint in the action below leads us to the conclusion that Bradt has failed to meet this threshold requirement.

As best we can determine from the record, Bradt appears to assert the deprivation of his work-product immunity, his attorney-client privilege, and his privilege against self-incrimination. We need not dwell long on these assertions.

[3-6] Bradt argues that the immunity accorded to an attorney's work-product by the federal sovereign is an immunity secured by the ninth amendment, and made binding on the states through the fourteenth amendment, to the Constitution of the United States. R.I.: 66-69. Our research uncovers no authority, and we are cited to none, that would support that proposition. The work-product

immunity asserted by Bradt as a federal right is embodied, as a *federal* right, in the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 26(b)(3). Those Rules do not, however, govern practice and procedure before the courts of the several states. *Rader v. Baltimore & O.R. Co.*, 108 F.2d 980, 986 (7th Cir.), *cert. denied*, 309 U.S. 682, 60 S.Ct. 722, 84 L.Ed.2d 1026 (1940); *see* Fed. R. Civ. P. 1. The reach of discovery in the context of a civil action brought in the state district courts of Texas is defined by the law of Texas, and the immunity accorded to Bradt's work-product in that context is a creature of Texas law. As such, it is not a right, privilege, or immunity secured by the Constitution or laws of the United States, and is therefore not cognizable under § 1983. *Cf. Martinez v. California, supra.*

[7, 8] Similarly, insofar as it arises in the context of litigation before the courts of the several states, the attorney-client privilege constitutes an evidentiary privilege that is secured by *state* law, and not by the Constitution or laws of the United States.[4] *Beckler v. Superior Court of Los Angeles County*, 568 F.2d 661, 662 & n.2 (9th Cir. 1978); *OKC Corp. v. Williams*, 461 F.Supp. 540, 546 (N.D. Tex. 1978). *Cf. Maness v. Meyers*, 419 U.S. 449, 464 n.15, 95 S.Ct. 584, 595 n.15, 42 L.Ed.2d 574 (1975). As a creature of state law, the attorney-client privilege cannot be asserted as a basis for recovery under § 1983.

---

4. We do not hold that the attorney-client privilege can never assume constitutional significance. As the cases cited in the text above make clear, it can, and sometimes does. *See also Fisher v. United States*, 425 U.S. 391, 402-05, 96 S.Ct. 1569, 1576-78, 48 L.Ed.2d 39 (1976). Here, however, in the context of a civil action in state court, it does not. *Beckler v. Superior Court of Los Angeles County*, 568 F.2d at 662, 663 n.3.

[9-11] Unlike the work-product immunity and the attorney-client privilege discussed above, the fifth amendment privilege against compulsory self-incrimination *is* a creature of federal law secured by the Constitution of the United States, and if abridged under appropriate circumstances it may indeed support a claim under § 1983. In terms, the fifth amendment provides a testimonial privilege that protects an individual from being compelled to bear witness against himself in a criminal proceeding. It is clear from the record on appeal, however, that Bradt was not subjected to such compulsion. The record shows that Bradt was compelled under threat of criminal contempt citation to produce certain client files belonging to the law firm of Minns, Izen, Bradt & Associates, a professional corporation of Texas. Bradt does not allege that the contents of those records could be used against him in a criminal proceeding, or could lead to other evidence that might be so used; at most he suggests that his failure to produce the law corporation client files in accordance with the discovery order will subject him to criminal contempt penalties. Thus, no reading of the facts as delineated in Bradt's amended complaint, his brief to the district court, or his brief to this court on appeal, could lead to the conclusion that a deprivation of his fifth amendment privilege has occurred. *See Fisher v. United States,* 425 U.S. 391, 401-02, 96 S.Ct. 1569, 1576, 48 L.Ed.2d 39 (1976); *Maness v. Meyers,* 419 U.S. at 458-68, 95 S.Ct. at 591-96; *Bellis v. United States,* 417 U.S. 85, 88-94, 94 S.Ct. 2179, 2183-86, 40 L.Ed.2d 678 (1974).

We therefore conclude that the amended complaint has failed to state a claim upon which relief could be granted under 42 U.S.C. § 1983.

II

42 U.S.C. § 1985 provides, generally, that

> in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

A.

Two broad categories of conspiracies are described in § 1985(2). *Brawer v. Horowitz,* 535 F.2d 830, 839-40 (3d Cir. 1976). The first four clauses of § 1985(2) describe conspiracies that are designed to obstruct the course of justice in the federal judicial system.[5] *Id.* The last two clauses of § 1985(2) describe conspiracies designed to interfere with the equal protection of the laws.[6] *Id.*

---

5. 42 U.S.C. § 1985(2) provides, in part:
   If two or more persons in any state or territory conspire [A] to deter by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or [B] to injure such party or witness in his person or property on account of his having so attended or testified, or [C] to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or [D] to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror. . . .

6. § 1985(2) continues:
   [E] [I]f two or more persons conspire for the purpose of im-

[12] Because the first four clauses of § 1985(2) refer to conspiracies that are designed to obstruct the course of justice "in any court of the United States," plaintiffs seeking to recover under those clauses must show a nexus between the alleged conspiracy and a proceeding in federal court. *Id.* Because the last two clauses of § 1985(2) refer to conspiracies designed to deny or interfere with equal protection rights, plaintiffs seeking to recover under those clauses must show a racial or otherwise class-based discriminatory animus. *Slavin v. Curry*, 574 F.2d 1256, 1262 (5th Cir.), *modified*, 583 F.2d 779 (5th Cir. 1978) (rehearing *en banc* denied); *Brawer v. Horowitz*, 535 F.2d at 840.

[13] The amended complaint in the case before us meets neither requirement. No nexus whatsoever is shown between the alleged conspiracy and any federal proceeding. Nor does the complaint allege, or show facts sufficient to suggest, a racial or class-based invidiously discriminatory animus behind the actions complained of.

We conclude that the amended complaint has failed to state a claim upon which relief could be granted under 42 U.S.C. § 1985(2).

B.

Insofar as it is relevant to the case before us on appeal, 42 U.S.C. § 1985(3) identifies yet another category of conspiracies designed to deny the equal protection of the laws:

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peding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny any citizen equal protection of the laws, or [F] to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person or class of persons, to the equal protection of the laws. . . .

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws. . . .

[14] Because it addresses equal protection concerns, § 1985(3) requires, as an element of the cause of action, a racial or otherwise class-based invidiously discriminatory animus behind the conspirators' action. *Griffin v. Breckenridge,* 403 U.S. 88, 96-103, 91 S.Ct. 1790, 1795-98, 29 L.Ed.2d 338 (1971). As we have noted above, no such animus is shown in the present case.

For this reason, we conclude that the amended complaint has failed to state a claim upon which relief could be granted under 42 U.S.C. § 1985(3).

III

42 U.S.C. § 1986 extends liability in damages to those persons "who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 . . . are about to be committed, and having power to prevent or aid in preventing the commission of the same, [neglect or refuse] so to do. . . ."

This section on its face requires the existence of a valid claim under § 1985. *Hamilton v. Chaffin,* 506 F.2d 904,

913-14 (5th Cir. 1975). As is shown in Part II of this opinion, no such claim exists. Thus, the amended complaint has failed to state a claim upon which relief could be granted under 42 U.S.C. § 1986.

For these reasons, the order of the court below dismissing the appellant's complaint for failure to state a claim upon which relief could be granted is AFFIRMED.

APPENDIX B

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX C

ARTICLE [IX]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

APPENDIX D

ARTICLE [XIV]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in anv way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer

of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
For The Southern District Of Texas
Houston Division

C.A. 78-H-2515

L. T. BRADT

v.

HONORABLE SHEARN SMITH, JOHN B. BIBLE, JOHN B. BIBLE & ASSOCIATES, INC., TOM ALEXANDER AND BUTLER, BINION, RICE, COOK AND KNAPP

FINAL JUDGMENT

In accordance with the Order entered on this date, it is ORDERED, ADJUDGED, and DECREED that this action be, and hereby is, DISMISSED.

The clerk is directed to file this Final Judgment and to send copies of the Order and Final Judgment to counsel of record.

DONE at Houston, Texas, on the 27th day of March, 1980.

/s/ JOHN V. SINGLETON
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

October Term, 19

No. 80-1461

Summary Calendar

D.C. Docket No. CA 78 H 2515

L. T. BRADT,
Plaintiff-Appellant,

v.

HONORABLE SHEARN SMITH, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

Before BROWN, POLITZ and TATE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the

District Court appealed from, in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

JANUARY 19, 1981

ISSUED AS MANDATE: March 11, 1981

Office-Supreme Court, U.S.
FILED
JUN 19 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2042

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

L. T. BRADT,

Petitioner

v.

THE HONORABLE SHEARN SMITH, ET AL.,

Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS RESTATED

1. Should the petition for writ of certiorari be granted to review the holding of the Court of Appeals that a trial or evidentiary hearing is not required to rule on a Motion to Dismiss filed pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure?

2. Should the petition for writ of certiorari be granted to review the holding of the Court of Appeals that the attorney-client privilege and the work-product immunity are not rights, privileges or immunities secured by the constitution and laws of the United States when they arise in the context of a civil action in a state court?

3. Should the petition for writ of certiorari be granted to review the holding of the Court of Appeals that petitioner failed to allege a deprivation of his privilege against self-incrimination under the fifth and fourteenth amendments?

LIST OF PARTIES REQUIRED BY RULE 34.1(b)

The following were parties to this case in both the District Court and the Court of Appeals:

Tom Alexander

John B. Bible

John B. Bible & Associates, Inc.

L. T. Bradt

Butler, Binion, Rice, Cook & Knapp

The Honorable Shearn Smith

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No. 80-2042

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

L. T. BRADT,

Petitioner

v.

THE HONORABLE SHEARN SMITH, ET AL.,

Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Bradt* v. *Smith*, 634 F.2d 796 (1981). The Order of the United States District Court for the Southern District of Texas is not reported.

STATEMENT OF THE CASE

The opinion of the Court of Appeals correctly states the procedural background and facts of this case. For clarity, reference to the parties in this Brief will be made by their surnames.

REASONS FOR DENYING THE WRIT

The questions presented in the petition for writ of certiorari are not of national significance and are not appropriate for review by this Court. Bradt seeks to have this Court apply the federal civil rights statutes to a pretrial discovery matter in a civil proceeding in a state court. The courts below applied well-settled principles of federal law when they denied the relief sought by Bradt in this case. Thus, there is no compelling reason why this Court should review the disposition of this case by the courts below.

1. BRADT IS NOT ENTITLED TO A TRIAL OR AN EVIDENTIARY HEARING ON A MOTION TO DISMISS WHICH IS FILED PURSUANT TO RULE 12(b)(6).

In his first argument in the petition, Bradt claims that the Court of Appeals erred when it affirmed the dismissal of his Amended Complaint without giving him an opportunity to present evidence in support of his allegations. (Petition at 7-9). As this Court is aware, Alexander and Butler Binion based their Motions to Dismiss on Rule 12(b)(6), Federal Rules of Civil Procedure, and claimed that Bradt failed to state a claim upon which relief could be granted. (R. 38, 86). It is clear from the Rule, and the authorities, that such a Motion is directed to the sufficiency of the claim for relief, not the evidence in support of the claim. 5 Wright and Miller, *Federal Practice and Procedure,* §§ 1356, 1366 (1971); *compare* Rule 12(b)(6) *with* Rule 56.

Alexander and Butler Binion recognize their burden under Rule 12(b)(6). However, their position in the courts below was that Bradt failed to state a cause of action against them under 42 U.S.C. §§ 1983, 1985 and 1986 even if the allegations contained in the Amended Complaint were taken as true. The question before the Court of Appeals was whether the Complaint itself stated a valid claim for

relief. If the Complaint was insufficient as a matter of law, the trial court correctly dismissed it. *Nevels* v. *Wilson*, 402 F.2d 479 (5th Cir. 1968); *Sacks* v. *Reynolds Securities, Inc.*, 593 F.2d 1234 (D.C. Cir. 1978).

In short, Bradt does not challenge the merits of the dismissal in his first argument in the petition. Rather, he claims that the method by which the trial court made its decision, that is, based on the Amended Complaint alone, was improper. This is precisely the procedure outlined in Rule 12(b)(6), and it was entirely proper for the trial court to make such a ruling. Since the allegations were taken as true, a trial or evidentiary hearing would have served no useful purpose. The trial court did not err when it followed the dictates of Rule 12(b)(6), and dismissed the case based on the pleading alone. Quite simply, Bradt was not entitled to present evidence to the Court under this particular Rule.

2. THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT IMMUNITY ARE NOT RIGHTS, PRIVILEGES OR IMMUNITIES SECURED BY THE CONSTITUTION AND LAWS OF THE UNITED STATES WHEN THEY ARISE IN THE CONTEXT OF A CIVIL PROCEEDING IN A STATE COURT.

In his second argument in the petition, Bradt claims that the Court of Appeals erred when it held that Respondents were immune from liability under 42 U.S.C. § 1983. (Petition at 9). Bradt has clearly misread the opinion of the Court of Appeals on this point. The Court did not hold that Respondents were immune under the statute since the Court never reached the issue. Rather, the Court found that there was no deprivation of a federal constitutional or statutory right, so there could be no liability under the statute. 634 F.2d at 799. Thus, the only issue before this Court is whether the petition for writ should be granted to review

the finding that Bradt was not deprived of a federal right in the state court proceeding. The section of the petition dealing with the immunity issue is not relevant to this case, since Bradt failed to meet the threshold requirement for liability under 42 U.S.C. § 1983.

It is clear that the first inquiry in any action brought under 42 U.S.C. § 1983 is whether the Plaintiff has been deprived of a right "secured by the Constitution and laws" of the United States. *Baker* v. *McCollan,* 443 U.S. 137 (1979). As an analytical matter, the federal court should isolate the specific claim involved in order to determine if it falls within the requirement of the statute. *Martinez* v. *State of* Cali*fornia,* 444 U.S. 277, 284 n.9 (1980). Section 1983 does not create any substantive federal rights, but merely provides a remedy for a deprivation of a right existing under another federal law. *Chapman* v. *Houston Welfare Rights Organization,* 441 U.S. 600 (1979). A brief review of the Amended Complaint, and the Petition, compels the conclusion that Bradt failed to meet this threshold requirement.

It is important to note that Bradt claims the deprivation of federal constitutional and statutory rights resulting from a discovery Order made by Judge Smith in the state court proceeding. Bradt argues that the Order on Defendants' Motion for Production of Documents violated his rights under the attorney-client privilege, work-product immunity, and the fifth amendment. These Respondents would show that the first two doctrines do not comprise federal rights, and that the third doctrine has no application to this case.

42 U.S.C. § 1983 is not concerned with violations of state law. A cause of action under the statute will lie only when such a violation results in a deprivation of a federal right.

Cook v. *Houston Post Co.*, 616 F.2d 791 (5th Cir. 1980); *Crocker* v. *Hakes*, 616 F.2d 237 (5th Cir. 1980); *Singler* v. *Lowrie*, 404 F.2d 659 (8th Cir. 1968), *cert. denied*, 395 U.S. 940 (1969). As a general matter, the federal courts have held that violations of state discovery rules are not cognizable under § 1983. *See, e.g., Sarelas* v. *Porikos*, 320 F.2d 827 (7th Cir. 1963) (an alleged abuse of the deposition procedure in the state court failed to state a claim under § 1983); *Brown* v. *Dunne*, 409 F.2d 341 (7th Cir. 1969) (denial of hearing by state court judge on motion to vacate previous order in probate matter did not present federal claim). Of course, a federal court cannot amend a state rule of civil procedure. *Herschel* v. *Smith*, 361 F.2d 355 (9th Cir. 1966). Although these cases provide general guidelines in this area, these Respondents will discuss each of Bradt's theories separately and briefly.

The attorney-client privilege is a rule of evidence, not a constitutional right. *Maness* v. *Meyers*, 419 U.S. 449, 466 n. 15 (1975); *OKC Corp* v. *Williams*, 461 F.Supp. 540, 546 (N.D. Tex. 1978); Fed R. Evid. 501. This is particularly true in a civil case in which there are no sixth amendment implications. As such, the privilege is a matter of state law in a state court proceeding. If Judge Smith ordered Bradt to produce documents in violation of the privilege, he did so under state law. *Beckler* v. *Superior Court of Los Angeles County*, 568 F.2d 661 (9th Cir. 1978); *compare* Fed. R. Evid. 101 and Fed R. Evid. 501 *with* Tex. Code Crim. Proc. § 38.10 and *West* v. *Solito*, 563 S.W.2d 240 (Tex. 1978). The attorney-client privilege arises under federal law only when it is applied in the federal court. Thus, as a rule of evidence, the federal doctrine was not relevant to the proceeding before Judge Smith. Even if the privilege was violated, it did not comprise a deprivation of a federal constitutional or statutory right, and cannot be the basis for a claim under § 1983.

The same rationale applies to the claim of work-product immunity. This doctrine is recognized and contained in both the federal and state rules of civil procedure. Fed.R. Civ.Proc. 26(b); Tex.R.Civ.Proc. 186a. No court has elevated this qualified immunity to a constitutional principle, and it is based solely on the rules of civil procedure. The Texas court is under no burden to apply the federal rule in its own proceedings. *Rader* v. *Baltimore & Ohio R. Co.*, 108 F.2d 980 (7th Cir. 1940), *cert. denied*, 309 U.S. 682 (1941); *compare* Fed.R.Civ.Proc. 1 *with* Tex.R. Civ.Proc. 2; *see also Hanna* v. *Plummer*, 380 U.S. 460 (1965). The state is free to set the limits of the immunity without interference from the federal court. In short, the work-product immunity cannot provide the federal right necessary under § 1983, since it is based on state law in the state court.

3. BRADT FAILED TO ALLEGE A DEPRIVATION OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS.

In his final argument in the petition, Bradt states that his privilege against self-incrimination was violated in the state court proceeding. He makes this claim without any reference to his pleadings or the law. Quite simply, the fifth amendment is not involved in this case. Bradt makes a general claim that Judge Smith and these Respondents violated his constitutional right against self-incrimination through the use of "coercive measures under the Texas Discovery Statutes." (R. 53). More specifically, Bradt complains that Judge Smith, on the Motion of these Respondents, ordered Bradt to produce the files of all clients who were former clients of Bible & Associates. (R. 50). There is no basis for application of the fifth amendment under these facts.

Since the state court action is a civil proceeding, Bradt may claim the privilege only if the contents of the documents might incriminate him in a future criminal suit. *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973). As the Court noted in *National Labor Relations Board* v. *Trans Ocean Export Packing, Inc.*, 473 F.2d 612 (9th Cir. 1973):

> ... where [a fifth amendment] claim is made in a case other than a criminal prosecution of the person claiming the privilege, the claim may be rejected if, under the circumstances, the witness may not reasonably apprehend that the disclosures he is called upon to make could be used against him in a criminal prosecution or could lead to other evidence that might be so used.

Id. at 617, *citing Murphy* v. *Waterfront Commission*, 378 U.S. 52, 94 (1964) (White, J., concurring). There is no claim here that the content of the documents would subject Bradt to criminal prosecution. Rather, Bradt asserts that he may be liable for criminal contempt if he refuses to produce them. This possibility does not cloak the documents with fifth amendment protection.

Furthermore, there is no privilege for Bradt as the custodian of the records for his clients. A very similar situation to the case at bar was presented in *Bellis* v. *United States*, 417 U.S. 85 (1974). There, a federal grand jury issued a subpoena to a member of a dissolved law partnership, which demanded the partnership's financial books and records. The lawyer refused to produce the documents on fifth amendment grounds, and the District Court held him in contempt. The Court of Appeals affirmed. *In re Grand Jury Investigation*, 483 F.2d 961 (3rd Cir. 1973) (per curiam).

This Court issued a writ of certiorari, and affirmed the lower courts. The Court held that the partnership, although

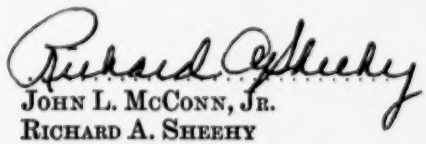
small, had an institutional identity, and that there was no fifth amendment protection for the custodian of the records. The Court emphasized that the privilege is personal, that is, it extends only to an individual's private papers and testimony. Thus, the Court found that the records of the firm were not privileged even if they incriminated the lawyer personally. *See also Matter of Berry,* 521 F.2d 179 (10th Cir. 1975), *stay denied,* 423 U.S. 810 (1975), *cert. denied,* 423 U.S. 928 (1975), *reh. denied,* 423 U.S. 1039 (1976); *United States* v. *Mahady & Mahady,* 512 F.2d 521 (3rd Cir. 1975). Of course, Bradt may not assert the privilege on behalf of his clients. *Fisher* v. *United States,* 425 U.S. 391 (1976). In short, since the content of the files would not subject Bradt to criminal prosecution, and they are in his possession in a representative capacity, there is no fifth amendment right involved here. *See Beckler* v. *Superior Court of Los Angeles County,* 568 F.2d 661 (9th Cir. 1978).

It is clear that the use of the state discovery rules in this case, even if improper, did not implicate any right "secured by the Constitution and laws" of the United States. The Order for production of documents issued by Judge Smith, in the state court, under the state rules of civil procedure, is a matter of state law. There is no federal right involved here. Thus, the Court of Appeals correctly affirmed the dismissal of Bradt's Complaint for failure to state a claim upon which relief could be granted. Fed. R. Civ. Proc. 12(b)(6); *Baker* v. *McCollan,* 443 U.S. 137 (1979).

CONCLUSION

It is clear from the authorities discussed herein that the Court of Appeals applied principles established by this Court when it affirmed the dismissal of Bradt's Amended Complaint for failure to state a claim upon which relief could be granted. Respondents Alexander and Butler Binion respectfully request this Court to deny the petition for writ of certiorari.

Respectfully submitted,



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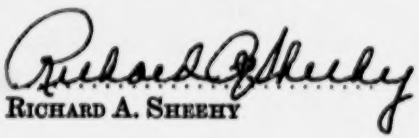
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was forwarded, regular mail, postage prepaid, to all counsel of record on this 18th day of June, 1981.



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